SUPREME COURT OF THE UNITED STATES
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OCTOBER TERM, 1898.

No. 257.

THE FIRST NATIONAL BANK OF CONCORD, NEW HAMPSHIRE, PLAINTIFF IN ERROR,

v.

EDWARD HAWKINS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK OF INDIANAPOLIS.

BRIEF FOR PLAINTIFF IN ERROR.

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Counsel for Plaintiff in Error.

CONCORD, N. H.:
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1899.

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EDWARD HAWKINS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK OF INDIANAPOLIS, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case comes up on a writ of error from the United States Circuit Court of Appeals for the first circuit. The suit was brought by the defendant in error against the plaintiff in error in the Circuit Court for the District of New Hampshire, upon a plea of debt (Record, *p.* 4); and a trial was had by the court, trial by jury being waived. Record, *p.* 5. The court found that the defendant in error was the receiver of the Indianapolis National bank, which was duly organized and authorized to do business as a national banking association; that the bank was declared insolvent and ceased to do business on the twenty-fourth day of July, 1893, and the defendant in error was duly appointed and qualified as receiver of said bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month; that the capital stock of the bank was 3.000 shares of the par value of $100 each; that on the 25th day of October, 1893, an assessment was ordered by the comptroller of $100 per share on the capital stock of the bank, to enforce the

individual liability of shareholders, and an order was made that such assessment be paid on or before the 25th day of November, 1893, and the plaintiff in error was duly notified thereof. The court also found that the plaintiff in error was a duly organized National banking association doing business at Concord, N. H.; that on the 21st day of May, 1889, with a portion of its surplus funds, it purchased of a third party 100 shares of the stock of the Indianapolis National bank as an investment, and has ever since held the same as an investment; that since its purchase of said stock, its name has appeared upon the books of the Indianapolis bank as a shareholder of 100 shares of the stock; that during such holding it received annual dividends declared by the Indianapolis bank prior to July, 1893; and that it has not paid said assessment or any part thereof. Record, *p.* 6.

Upon the foregoing facts the court ruled that the defendant in error was entitled to recover; and the plaintiff in error duly excepted thereto upon the following grounds:

First. That the plaintiff in error, as a national banking association, had no power or authority to purchase with its surplus funds, as an investment and hold as such, shares of stock in another national banking association, as such purchase and holding are *ultra vires* of the corporation.

Second. That the defendant, as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

Third. That as a matter of law, the defendant is not liable upon the facts found, to pay the assessment sought to be recovered in this case. Record, *p.* 7.

Thereupon the plaintiff filed a bill of exceptions to the ruling of the court upon said statement of facts, which on August 11, 1896, was duly allowed (Record, *pp.* 7, 8), and on the 24th day of August, 1896, judgment was rendered by said circuit court against the plaintiff in error. Record, *p.* 9.

Thereupon the plaintiff in error filed a petition for a writ of error to the Circuit Court of Appeals for the first circuit, together with an assignment of errors (Record, *p.* 9), in which it was claimed that there was manifest error in the ruling of the circuit court, that the defendant in error is entitled to recover upon the facts found by the court, as hereinbefore set forth, to which ruling the defendant in error duly excepted, as above set forth. Record, *pp.* 9, 10.

Upon said writ of error, a hearing was had before the Circuit Court of Appeals upon said alleged errors, when on March 5, 1897, the judgment of the circuit court was affirmed with interest, and with costs of that court to the defendant in error. Record, *pp.* 13, 14, 15. Whereupon the defendant in error filed a motion for a rehearing in said Circuit Court of Appeals, which motion was denied. Record, *pp.* 15–18. Afterwards the defendant filed in said Circuit Court of Appeals, an assignment of errors claiming,

First. That there was error in the ruling that the defendant in error was entitled to recovery, in that,

1. The plaintiff in error as a national banking association has no power or authority to purchase with its surplus funds as an investment and hold as such, shares of stock in another national banking association; such purchase and holding are *ultra vires* of the corporation.

2. The plaintiff in error as a national banking association has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

3. As a matter of law, the plaintiff in error is not liable upon the facts found to pay the assessment sought to be recovered in this case.

Second. That said Circuit Court of Appeals erred in making its order on the fifth day of March, 1897, affirming the judgment of the said circuit court, with interest and costs of said Circuit Court of Appeals to the defendant in error.

Third. That said Circuit Court of Appeals erred in not sustaining the writ of error there before it and not reversing the judgment entered in this action in the circuit court.

SPECIFICATION OF ERRORS RELIED UPON.

The following is a specification of errors relied upon which are asserted and intended to be relied upon in this brief and the argument thereon. The Circuit Court of Appeals erred in ruling that the defendant in error was entitled to recover, in that,

1. The plaintiff in error as a national banking association has no power or authority to purchase with its surplus funds as an investment and hold as such, shares of stock in another national banking association; such purchase and holding are *ultra vires* of the corporation.

2. The plaintiff in error as a national banking association has no

power or authority to incur liability to pay the assessment sought to be recovered in this case.

3. As a matter of law, the plaintiff in error is not liable upon the facts found to pay the assessment sought to be recovered in this case.

The error in the respects above enumerated fully appears from the printed opinions of the said Circuit Court of Appeals. Record, *pp.* 13, 17.

BRIEF OF THE ARGUMENT.

I.

The recent decision in California National Bank v. Kennedy, 167 *U. S.* 362, *determines the point raised in this case.*

In *California National Bank* v. *Kennedy*, 167 U. S. 362, it was held that stock of a savings bank, not taken as security or acquired in the course of the business of banking, cannot be purchased or dealt in by a national bank. The fact was the national bank held the savings bank stock as a purchaser; it did not take the stock to protect itself against loss for money previously loaned; it did not take it as collateral security; it attempted to engage in the business of dealing in the stock of another corporation. Precisely the same state of material facts exist in the case at bar with reference to the manner in which the First National bank of Concord acquired and held stock in the Indianapolis National bank; and the same legal result necessarily and logically follows.

In denying the petition of the plaintiff in error for a rehearing, in the Circuit Court of Appeals, *Putnam, Circuit Judge*, says, referring to *Bank* v. *Kennedy* (Record, *p.* 17, 82 Fed. 301):

"The issue considered by the supreme court was the liability of a national bank as a stockholder in a state savings bank, while the question before us was as to its liability as a stockholder in another national bank. The question discussed by the supreme court was more largely that of *ultra vires* than that of the policy of the statutes relating to national banking associations, and its line of decisions, which we understood to bind us in the case at bar, were not particularly noticed by it."

The only distinction suggested between the two cases is, that in the one case the stock held by the national bank was savings bank stock, in the other it was national bank stock. But can it be seriously contended that the power of a national bank to hold stock

depends upon the question whether the stock is issued by one corporation or by another? The power, if it exists at all, is derived from the act of congress.

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of these powers implies the exclusion of all others not fairly incidental."

Central Trans. Co. v. *Pullman Co.*, 139 U. S. 24.

By section 5,136, Rev. Stats., a national banking association is authorized,—

"To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

No power is here granted to national banks to buy and sell stocks generally; nor is such power incidental to the business of banking.

Morse, Banks & Banking, 1,213;
First National Bank v. *Exchange Bank*, 92 U. S. 122;
Logan County N. Bank v. *Townsend*, 139 U. S. 67, 73;
Royal Bank of India's Case, L. R. 4 Ch. App. 252;
Fowler v. *Scully*, 72 Pa. St. 456;
Weckler v. *National Bank*, 42 Md. 581;
Nassau Bank v. *Jones*, 95 N. Y. 115.

If, then, the general proposition, supported as it is by the authorities, is true, that a national bank cannot engage in the business of buying and selling stocks, there is no room for the inconsistent and contradictory inference, that it may invest its surplus in the stock of another national bank, but not in the stock of a savings institution. If congress has not given it power to act in the one case, it has not in the other. No reason can be suggested why such power should be deemed incidental to the business of banking when the stock in question happens to be national bank stock, and not incidental when it happens to be some other corporate stock. None of the cases bearing upon this general subject make or suggest such a distinction, excepting only the remark of the circuit judge, below, in his

"Upon this branch of the case the question for solution is, therefore, whether the individual liability of stockholders provided for by section 10, above quoted, is in the nature of a penalty, or whether it is, as plaintiffs contend, based on a contract between the stockholders and the creditors of the company. We think the liability imposed by section 10 is a liability arising upon contract. . . . Everyone who becomes a member of the company by subscribing to its stock, assumes this liability."

Cook (Stock and Stockholders, *s.* 223) says:

"But the usual statutory liability of stockholders is not a penalty. The courts are unanimous in holding that where, by statute the stockholders in a corporation, instead of being relieved entirely from liability to corporate creditors, are only partially relieved therefrom, the additional liability is a contract liability, and will be enforced by the courts of any state. In other words, the ordinary statutory liability of stockholders is a contract liability, and will be enforced as such by the courts of all the states."

See, also, *Hodgson* v. *Cheever*, 8 Mo. App. 321;
Manville v. *Edgar*, 8 Mo. App. 324;
Quenman v. *Palmer*, 117 Ill. 619;
Aulhman's Appeal, 98 Pa. St. 505;
Sackett's Harbor Bank v. *Blake*, 3 Rich. Eq. 225;
Woods v. *Wicks*, 7 Lea 40;
Van Riper, ex parte, 20 Wend. 614;
Grand Rapids Bank v. *Warren*, 52 Mich. 557;
Lowry v. *Inman*, 46 N. Y. 119;
Corning v. *McCullough*, 1 N. Y. 47.

In the opinion given by the court below (Record, page 14) it is said: "The liability sought to be enforced here arises by force of the statute, and is not contractual," citing *Keyser* v. *Hitz*, 133 U. S. 138, 151. One question in that case was whether a married woman had capacity to become the owner of stock in moneyed corporations. It was held that she had, and that consequently she became liable to assessment upon national bank stock legally held by her as any other legal holder. In other words congress had given her the requisite capacity to hold national bank stock, and her liability to assessment upon her stock was not enforced upon the ground that it was a penalty, or that it was not founded upon principles ordinarily governing contracts. Indeed that question was not raised or discussed in that case. For similar reasons cases like *In re Reciprocity Bank*, 22 N.

Y. 9, *Witters* v. *Sowles*, 32 Fed. 767, and *Robinson* v. *Turrentine*, 59 Fed. 554, are not in print.

In the case of *Foster* v. *Chase*, 75 Fed. 797, it was held that a father who bought national bank stock for his minor children was himself liable to an assessment thereon, and not the children, on the ground that "assent is necessary to becoming a shareholder, subject to this liability, in a national bank; and as the minors could not give their assent, that is, could not make a valid contract, they could not authorize their father to do so for them." And the court say:

"This liability has been sought for defendant to be likened to that of married women becoming shareholders; but that has been where, and because the law of the place authorized them to become such."

If, therefore, the Concord bank had the legal capacity to contract for the purchase of the stock in question it may be liable to this assessment; otherwise, it is not.

IV.

The Concord Bank had no power to make the contract, and it cannot be enforced against it.

It purchased the stock as an investment with its surplus earnings. It is not claimed that it took it on account of a preëxisting debt, or as collateral security. It assumed to exercise the power of going into the stock market and dealing in stocks, a power which *Bank* v. *Kennedy* decides it did not possess. The question then is whether that case ought to be overruled.

(*a*) It is familiar law that a corporation possesses only such powers as are expressly conferred upon it by its charter or the law to which it owes its existence, and such as are necessarily incident thereto.

Dartmouth College Case, 4 Wheat. 518, 636;
Bank v. *Dondridge*, 12 Wheat. 64, 68;
Head v. *Ins. Co.*, 2 Cranch. 127;
Beaty v. *Knowler*, 4 Pet. 152;
Bank v. *Earle*, 12 Pet. 519, 587;
Perrin v. *Canal Co.*, 9 How. 172;
Oregon Railway Co. v. *Railway Co.*, 130 U. S. 1;
Logan County N. Bank v. *Townsend*, 139 U. S. 67;
Central Trans. Co. v. *Pullman Co.*, 139 U. S. 24;
Reese, ultra vires, ss. 8–15.

(*b*) The power to purchase shares of stock in other corporations as an investment is not specially conferred by the National Banking Act. If it exists at all it must be upon the ground, that it is a necessary incident to the general business of banking. The statute (Rev. Stats. *s.* 5136) authorizes national banking associations to exercise "all such incidental powers as shall be necessary to carry on the business of banking; . . . by buying and selling exchange, coin and bullion." No authority is here given to buy and sell stocks, or to buy and sell horses or other personal property. Dealing in stocks is excluded as much as dealing in horses.

In *First National Bank* v. *Exchange Bank*, 92 U. S. 122, it was held that:

"Dealing in stocks is not expressly prohibited, but such a prohibition is implied by the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money, so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks."

In *Fowler* v. *Scully*, 72 Pa. St. 456, the facts were that Fowler made a mortgage to Scully, as trustee of the First National Bank of Pittsburg, as security for future advances to be made by the bank to Fowler. The bank, through Scully, now seeks to foreclose the mortgage, against Vandirk, the assignee of the mortgagor, who sets up as a defense that the mortgage was void, being *ultra vires* and cannot be enforced even against him who brought with notice. The court say:

"In view of the rule of interpretation of such charters given to us by the Federal Courts, and the maxim—*expressio unius est exclusio alterius*, the argument might close with the terms of the power to loan money on *personal* security; for, agreeably to this rule and maxim, no other security than personal can be taken for money lent. . . . The reasons are manifest. The business of a bank is commercial, not that of dealing in real estate, brokerage, etc. It therefore does not buy and sell real estate, ground rents, mortgages, stocks, produce, etc. . . . The evident intention of congress is, that national banks should be institutions of commerce, not dealers in real estate, stocks or produce."

In *Weckler* v. *National Bank*, 42 Md. 581, it was decided that a national bank has no authority to engage in the business of selling

bonds on commission. In discussing the statute which contains the grant of powers to banking corporations, the court say:

"No construction can be given to these terms as used in this statute so broad as to comprehend the authority to sell bonds for third parties on commission, or engage in business of that character. The appropriate place for the grant of such a power would be in the clause conferring authority to 'buy and sell,' but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim, *expressio unius est exclusio alterius*, and in view of the rule of interpretation of corporate powers before stated, the carrying on of such business is prohibited to these associations."

The question raised in *Nassau Bank* v. *Jones*, 95 N. Y. 115, as stated by the court, related to "the right of a banking corporation chartered under the laws of this state to subscribe for the stock of a railroad corporation." The general banking law of New York, so far as it is material to this question, is almost identical with the National Banking Act. The bank claimed that Jones bought certain railroad stock under an agreement to hold one half of it for the bank. The court say:

"It is clear that a banking corporation cannot enter into a contract of this character, unless it has authority under its charter to become a subscriber for the stock of railroad corporations, and thereby assume the obligations to which stockholders are subject by statute. . . . Even a cursory view of the provisions of the statute under which the plaintiff was organized, and the cases giving construction to the powers thereby conferred, renders it quite clear that the contract under which the plaintiff claims was not only *ultra vires* but contrary to public policy. . . . The language employed in the act defines their powers and duties, and excludes by necessary implication a capacity to carry on any other business than that of banking, and the adoption of any other methods for the prosecution of such business than those specially pointed out by the statutes. . . . The implied restrictions upon the corporations formed under the act of 1838, against transacting any other business than that of banking, and the careful definition given to that word, not only by lexicographers, but also in the reported cases, would seem clearly to establish a want of authority in such corporations to engage in any business transactions, excepting such as relate to the collection of business paper, the buying and selling of coin and exchanges, and the loaning of moneys upon the securities pointed out by the statute. Certainly, the utmost liberality in the construction of the powers given to these corporations would not include the right claimed for them in this case. . . . The spirit of the law, as well as a sound public policy, forbid these institutions from risk-

ing the moneys intrusted to their care in doubtful speculations or enterprises."

In *Royal Bank of India's Case*, L. R. 4 Ch. App. 252, the Royal bank held certain shares of stock in another bank as collateral for several years, receiving the dividends and being treated as the owner thereof. Upon the failure of the latter bank, the question arose, whether the Royal bank could be compelled to contribute as a shareholder. Its charter gave it very wide powers as to carrying on the business of banking. The court remark:

"What, then, was the transaction? I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank, or prevent them from repudiating these shares."

While this may be said to be *dictum*, the positiveness of the assertion shows that it was not even regarded as a debatable question; so that the quotation is valuable as an authority.

See also *Wiley* v. *National Bank*, 47 Vt. 546;
Whitney v. *National Bank*, 50 Vt. 388;
Talmage v. *Pall*, 7 Selden 328;
Franklin Company v. *Bank*, 68 Me. 43;
Crocker v. *Whitney*, 71 N. Y. 161.

It is safe to say that there are no respectable authorities holding that a national bank has the power, either express or implied, to engage in the business of dealing in stocks; so that, it is submitted, that the proposition that the First National bank of Concord had no corporate power to invest its money in the speculation of buying stock in the Indianapolis bank, cannot be successfully attacked or overthrown. That the purchase of stock to-day with a portion of its surplus funds, which it may sell to-morrow, is a dealing in stock,—is a pure speculation,—cannot be doubted. Whether it is a prudent or wise speculation, is wholly immaterial.

While a bank may, for the purpose of collateral security or for its own protection against its debtors, acquire stock in other corporations, on the ground that such power is a necessary incident in the prosecution of its legitimate business, the buying of stock for speculative purposes, which is unnecessary and not incidental to the purposes of the corporation, is the attempted exercise of a power which

does not exist, because it never was granted. And the cases which hold that a bank may become a stockholder in another corporation, when necessary for its own protection, are careful to state in substance that it could not purchase stock as an investment or for speculation; that is, it cannot engage in the business of dealing in stocks, as the Concord bank attempted to do in this case.

It is also to be noted that the power to hold stock as collateral security does not fall within the general powers conferred by statute, but is merely incidental thereto,—incidental to the power of "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt," and of "loaning money on personal security." It is purely and simply incidental and subordinate, and if the bank, for its own protection, is compelled to take the stock and become a stockholder, it does it, not by virtue of any general legislative authority to deal in stocks, but on the ground of necessity growing out of its general power to loan money.

(*c*) The case of *Citizens' Bank* v. *Hawkins*, 71 Fed. 369, cannot be sustained. Practically the same question was raised in that case as is under consideration here, and the assessment was held to be legal, on the ground that the acquisition of the stock was within the incidental powers of the bank, and that the facts did not present a case of the exercise of a power not in any event given. But it is evident the court misapprehended the real question involved. The test is not whether the bank had capacity to acquire stock for any purpose, but whether it had the power to make the contract by which the stock came into its possession. If it did not possess that power, if it was absolutely without authority to bind itself under the terms of the contract, its attempt to do so was entirely ineffectual, and it did not bind itself. It acquired no rights and assumed no liabilities by virtue of its *ultra vires* and absolutely void contract. If the bank was authorized to contract for stock in certain exceptional cases, it would be absurd to say that it, therefore, had the power to make any contract it might desire for the acquisition of stock. The transaction was *ultra vires* and void, not because the bank could not hold stock or could not under any circumstances become a stockholder, but because it had no power whatever to engage in the business of dealing in stocks, which was the business it attempted to do in that case. The true contention before the court was that the bank not having the power to make the contract, could not assume the liabilities of a stockholder under that void contract; the decision was that, having

power to hold stock for certain purposes, it could assume the liabilities of a stockholder under all contracts, void as well as valid.

The authorities cited in that case do not sustain the decision. They are cases where the question of *ultra vires* was raised by third parties, not by the corporations. That decision, if generally followed and recognized, would practically abolish the doctrine of *ultra vires*, and render valid and binding, contracts otherwise void and uninforcible. It admits that the bank was not authorized to make the contract by which it acquired the stock, but holds that having in fact made it, it is in law bound by it; in other words that incapacity becomes capacity by the mere act of the parties. If such a result should be sustained, then a most convenient, effective, and inexpensive method has been devised, without the intervention of the legislature and in direct opposition thereto, by which unlimited power may be conferred upon corporations; and the doctrine of *ultra vires* as between the parties becomes a dead letter.

(*d*) It may be argued that if it appears from the books of the Indianapolis bank, that the Concord bank held this stock, the court will conclusively presume that the Concord bank acquired it in some legitimate way. But that cannot be the statement of a sound principle of law. If, for instance, stock happens to stand in the name of an infant or of a lunatic, he certainly is not bound to respond to an assessment levied on the stock. And this was distinctly held in the case of an infant in *Foster* v. *Chase*, 75 Fed. 797. And why? Because the party sought to be charged had no capacity to make the contract by which he assumed to acquire the stock. Therefore, the matter stood as though no contract had been made, and no physical transfer had been made on the books of the corporation.

So in this case the Concord bank, not having the legal capacity to make the contract under which it attempted to acquire this stock by having it transferred to it by the Indianapolis bank, accomplished nothing; and it is submitted that the court must consider this question of capacity in the case of a national bank, as well as in the case of an infant or a lunatic. Indeed there is more reason for this examination when the name of a national bank appears as the holder of stock in another bank or corporation; for, the general rule being that it cannot in law acquire such property, interested parties are by that fact alone put upon inquiry to ascertain whether its reputed holding falls within any exception to the general rule. It follows that the creditors of the Indianapolis bank, when they discovered

that the First National bank of Concord appeared on the books of the former bank as a stockholder, were chargeable with knowledge of its general want of capacity, and ought to have ascertained whether it held the stock as collateral security or as a speculative investment under its contract of purchase. And this is only stating a fundamental principle of corporation law; that one dealing with a corporation is chargeable with knowledge of its corporate limitations. Reese, *Ultra Vires*, *ss.* 53, 54.

V.

The Concord Bank is not estopped to insist upon the defence of ultra vires.

It is sometimes said, in a somewhat careless manner, that no one but the government or the stockholders can take advantage of *ultra vires* acts. But it is to be observed that such remarks usually occur in cases where *debtors* of the corporation seek to avoid the payment of their debts by attacking the capacity of the corporation to make the contract. A very casual examination of the cases will disclose the fact that the corporation itself, representing its stockholders and its creditors, may set up as a valid defense to an action upon a contract its incapacity to make the contract. If it has received money of the other party under the void contract, it may be compelled to return it, not in pursuance of the contract, but in express repudiation of it, upon general *indebitatus assumpsit*.

"In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract."

Central Trans. Co. v. *Pullman Co.*, 139 U. S. 24.

In delivering the opinion of the court in *Penn. R. R. Co.* v. *St. Louis &c. Co.*, 118 U. S. 290, *Mr. Justice Miller* remarks:

"But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere

as the matter stands. We know of no well considered case where a corporation which is party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed farther, can be compelled to."

"Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. . . . . Though they delayed its performance for several years, it was nevertheless, a rightful act when it was done. Can this performance of a lawful duty, a duty which it owed to the stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in execution of a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

Thomas v. *Railroad Co.*, 101 U. S. 85.

It is also necessary in this connection to note a distinction between the effect of an act which is properly *ultra vires*—that is, an act beyond the corporate power of the corporation to perform, and the effect of an act within the powers granted, but in doing which the corporation has failed to comply with certain legal formalities. In the latter case the corporation may be estopped to insist on the defective execution of the power, having derived a benefit from the act,—but in the former case the act as against the corporation is absolutely void.

In *Central Trans. Co.* v. *Pullman Co.*, before cited in his very able and lucid opinion, *Mr. Justice Gray* says:

"It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court. . . . The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

"A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in

the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisities to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

These principles were applied in *Weber* v. *National Bank*, 50 Fed. 735. See also *Chicago &c. Railroad Co.* v. *Union Pacific Railway Co.*, 47 Fed. 15.

The same law prevails with reference to municipal bonds issued without authority.

Marsh v. *Fulton County*, 10 Wall. 676;
South Ottawa v. *Perkins*, 94 U. S. 260;
Parkersburgh v. *Brown*, 106 U. S. 487;
Bissell v. *Spring Valley*, 110 U. S. 162;
Dixon County v. *Field*, 111 U. S. 83;
Merrill v. *Monticello*, 138 U. S. 673.

In this case the action is upon a continuing or executory contract; it is continuing and executory so far as the liability to assessment is concerned; and to say that the Concord bank cannot now interpose this defense to this void contract, is to say that it cannot perform a duty it owes to the public, to its stockholders, and to its creditors. All the parties to this contract are chargeable with knowledge, as a matter of law, that it was beyond the power of the Concord bank to engage in the business of dealing in stocks and to invest its money as a speculation in the stock of the Indianapolis bank. They knew the contract they were making was void. They cannot be allowed to urge their ignorance in fact. Nor indeed do they insist upon any want of knowledge as an excuse for this unjustifiable and nugatory compact. But while the plaintiff's right of action is founded upon

nothing, while it never existed as a direct legal obligation, it is said that the defendant is estopped to take that position and to insist upon its rights thereunder. Why is it estopped? The Indianapolis bank was in possession of all the facts; it was not misled or deceived in any respect; and the Concord bank has received nothing under the contract which it is not accountable for on a proper proceeding. On these facts, it is not apparent how there can be any estoppel, or why the defense of *ultra vires* is not available. Taylor, Priv. Corp. *ss.* 275–281.

The principle of estoppel was urged in *Davis* v. *Railroad*, 131 Mass. 258. It was there held to be beyond the powers of a railroad corporation and of a corporation formed for the manufacture of musical instruments, to guarantee the payment of the expenses of a musical festival, and that no action could be maintained thereon, although the festival had been held and expenses incurred in reliance upon the guaranty,—a plain case of estoppel, if the corporations had had the power to make the contract. The obvious reason is that corporate power to do an act cannot be supplied by estoppel. Even the express assent of all the stockholders to the unauthorized act does not legalize it. They cannot ratify what they had no legal, corporate power to do in the first instance.

Ashbury, etc., Railway v. *Riche*, L. R. 7 H. L. 653.

In that case it was held that:

"A contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action."

And in *Thomas* v. *Railroad*, 101 U. S. 71 (before cited), *Mr. Justice Miller* says, that that decision "represents the decided preponderance of authority, both in this country and in England, and is based upon sound principles."

See, also, *Attorney General* v. *Railway Co.*, 5 App. Cas. 473;
Smith v. *Smith*, 10 App. Cas. 119;
Wenlock v. *The River Dee*, 10 App. Cas. 354;
Trevor v. *Whitworth*, 12 App. Cas. 409.

National Bank v. *Whitney*, 103 U. S. 99, *Reynolds* v. *Bank*, 112 U. S. 405, and *Thompson* v. *Bank*, 146 U. S. 240, are not at all applicable to this case. In those cases the defense of *ultra vires* was

insisted upon, not by the bank, but by a third party, in order to avoid the payment of a just debt, or to obtain some other unjust advantage as against the bank and its stockholders. No sound reason can be discovered why such a party should be thus protected. Corporate limitations are imposed, not for the benefit of individuals dealing with the corporation, but for the protection of its stockholders and creditors, and the public.

McCormick v. *Bank*, 165 U. S. 538.

In *Davis* v. *Railroad*, *supra*, the court in discussing cases of this character, says (page 272):

"Several of the cases most relied on by the plaintiffs were not suits against a corporation to compel it to pay money for a purpose not within the scope of its charter, but suits by a corporation to recover money or property, which, when recovered, would be held for the lawful uses of the corporation." Citing *National Bank* v. *Matthews*, 98 U. S. 621.

And the court add, that remarks by the court in such cases to the effect that only the sovereign can take advantage of *ultra vires* acts are wholly *obiter dicta*.

There is, therefore, a broad distinction between cases of that character and the present case. If the defense of *ultra vires* is not sustained in a case like this one, the limitation of corporate powers is a useless formality in legislation, so far as the corporation and those with whom it contracts, are concerned. If such a result is sanctioned by law, then the so-called incapacity of corporations to do things not authorized by law, and the so-called incapacity of married women and infants in certain particulars, are practically abolished, provided parties possess sufficient recklessness to proceed to do the acts, as a matter of fact, which, as a matter of law, they have not the capacity to do. And on the same theory, the more that is done under an *ultra vires* contract, the more anxious will the court be to sustain and legalize the illegal engagement.

If, therefore, this contract was *ultra vires* of the Concord bank,—if the power to engage in buying and selling stock was not granted to it by congress, then it is not liable to respond to this assessment, one of the necessary incidents in the void contract which it attempted to assume. It is of the greatest importance that banks and other corporations and people dealing with them should understand, that an agreement entered into with them which is not justified and

authorized by some power expressly or impliedly granted in their charters or by the general law, is absolutely void, and that a void contract is not a valid one. It is important that the legislative intention should be carefully observed in ascertaining the extent of corporate powers, and in sanctioning only the exercise of such power as has been granted.

"A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforcible by the application of the doctrine of estoppel."

Union P. R. Co. v. *Chicago &c. R. Co.*, 163 U. S. 564.

Both authority and principle fully sustain the decision of this court in *Bank* v. *Kennedy*, *supra*, where the following statements of the law upon this subject occur:

"Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act."

"The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stocks is consequently an *ultra vires* act. Being such, it is without efficacy. . . . Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred."

"The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability is but a reiteration of the contention, that the acquiring of stock by the bank under the circumstances disclosed, was not void but voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed or ratified."